Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-366

In the Supreme Court of the United States

OCTOBER TERM, 1989

WOMEN INVOLVED IN FARM ECONOMICS, PETITIONER

v.

CLAYTON K. YEUTTER, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether a court reviewing the validity of an agency regulation may rely upon the agency counsel's explanation for the regulation in the unique circumstance where the challenged regulation was promulgated nineteen years ago at a time when the agency had no obligation under the Administrative Procedure Act to create a contemporaneous record justifying its action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 876 F.2d 994. The district court's memorandum opinion (Pet. App. 30a-48a) is reported at 682 F. Supp. 599.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on June 2, 1989. The petition for a writ of certiorari was filed on August 31, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, Congress reacted to public criticism of the large sums of money certain farmers received through agricultural support programs by limiting the total payments a person may receive under these programs. Agricultural Act of 1970, § 101(1), 7 U.S.C. 1307(1). Congress delegated to the Secretary of Agriculture the task of promulgating regulations defining the term "person" under the statute. See Section 101(4), 7 U.S.C. 1307(4).

The regulations, which were issued within weeks of the enactment of the statute, provided that to be considered a separate person for the purpose of the payments limitation, an individual or legal entity must have a distinct interest in the land on which a crop is produced, exercise separate responsibility for such an interest, and be entirely responsible for payment of the cost of farming related to that interest. 7 C.F.R. 795.3. Based on the assumption that married couples generally shared responsibility for their family's farm, the regulations also provided that husbands and wives could not collect individualized benefits. 7 C.F.R. 795.11. In 1987, Congress codified the husband-wife rule, but instructed the Secretary to modify the regulations to exempt married couples who, prior to their marriage, separately engaged in unrelated farming operations and who continued to operate these farms as separate entities after marriage. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303(a)(2), 101 Stat. 1330-16. The Secretary has since published regulations implementing the 1987 amendments. See 53 Fed. Reg. 29,552, 29,556 (1988) (codified at 7 C.F.R. 795.11).

2. In this action, petitioner Women Involved in Farm Economics (WIFE), a national organization of women involved in farming and agriculture, challenged the husband-wife rule as applied to the 1988 crop year under the Administrative Procedure Act (APA) and the Fifth Amendment. The district court found in favor of petitioner on both grounds and entered an order enjoining respondents from enforcing the husband-wife regulation. Pet. App. 30a-48a.

3. A unanimous court of appeals reversed. The court rejected petitioner's contention that the husband-wife rule violated the equal protection component of the Fifth Amendment. Relying on this Court's opinion in *Lyng* v. *Castillo*, 477 U.S. 635 (1986), the court stated that "Congress constitutionally may legislate with a family model in mind that reflects economic and social reality." Pet. App. 25a. The husband-wife rule is therefore rational, the court held, because, like community property regimes and certain sections of the Internal Revenue Code, it takes into account the financial interdependence of husband and wife. *Id.* at 21a. The rationality requirement of the Fifth Amendment, the court stated, "requires no more precision than this." *Id.* at 27a.[1]

The court also reversed the district court's holding that the husband-wife rule was arbitrary and capricious. In so doing, the court noted that because the rule concerned "a matter relating to * * * public * * * benefits," 5 U.S.C. 553(a)(2) (1982), it was promulgated under an exception to the general requirement of the APA that published rules be accom-

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[1] Petitioner does not seek further review of this portion of the court of appeals' decision.

panied by "a concise general statement of their basis and purpose." 5 U.S.C. 553(c) (1982). Pet. App. 8a. The court recognized that under these "unusual circumstances," in which the agency had no obligation to furnish a contemporaneous explanation of its action, judicial review of the regulation must be based on the administrative record generated by agency counsel for the purpose of this litigation. Accordingly, the court held that it may give "at least some weight" to counsel's explanation for why the Secretary promulgated the husband-wife rule in 1970. *Id.* at 7a-8a.

The court stated that its reliance on counsel's explanation for the husband-wife rule did not conflict with the principle laid down by this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 83 (1943), that agencies, not courts, should provide justifications for agency action. The core concern of *Chenery Corp.*, the court stated, was that a court, through the process of judicial review, might adopt an explanation for a rule that had not been endorsed by the head of the agency. The Court feared that such action might restrict the agency's freedom to make policy in the future. The court of appeals held, however, that reliance on counsel's representations in this case did not pose similar dangers when the challenged regulation is nearly twenty years old and the agency's litigation task is "essentially historical" rather than "administrative policymaking." Pet. App. 11a. The court also held that under these unusual circumstances it was not necessary for counsel to procure an affidavit from the present Secretary confirming that counsel's representations accurately reflected the position of the agency. Such an affidavit, the court stated, would

add little to the court's understanding of why the challenged regulation was promulgated in 1970.[2]

The court proceeded to find that the Secretary's definition of the statutory term "person"—which included the husband-wife rule—was a legitimate interpretation of the statute. First, the court rejected petitioner's contention that the husband-wife rule was arbitrary because it created an irrebuttable presumption that married couples are not separate persons. The court held that because "the husband and wife working together on a family farm typically enjoy certain unique efficiencies" the Secretary could reasonably conclude that Congress authorized him to treat married couples as one person for the purpose of limiting farm support payments. Pet. App. 15a. The court acknowledged that there may be "the occasional family farms where husbands and wives * * * independently consume the fruits of their respective labors," but concluded that the administrative difficulty of drafting an exception for such economically independent husbands and wives justified the Secretary's decision simply to use marital status as a proxy for financial interdependence. Pet. App. 15a-16a.

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[2] In addition, the court noted that counsel's assertion that the husband-wife rule fell within the bounds of the Agricultural Act of 1970 was supported by special indicia of reliability. First, counsel's representations in this litigation were consistent with the position taken by the agency in similar litigation that took place eight years ago. In addition, the court found that the husband-wife rule was consistent with the legislative history of the Act. In particular, the court noted that the husband-wife rule bore a strong resemblance to draft regulations proposed during a congressional floor debate on the 1970 Act. Pet. App. 12a-13a.

Finally, the court disagreed with petitioner's contention that the Secretary's decision to declare all married couples ineligible for separate payments conflicted with the Agricultural Act's overall purpose of maximizing participation in the farm subsidy program and diverting acreage from production. The court acknowledged that the husband-wife rule might lead to results contrary to some goals of the statute, but found that the rule was entirely consistent with the provisions of the Act that limited payments under the programs and gave the Secretary authority to issue rules designed to assure a reasonable application of those limitations. Pet. App. 17a-19a. Accordingly, the court held that the husband-wife rule comported with the policy of the statute.

ARGUMENT

The decision of the court of appeals is a well-reasoned application of the general principles that guide APA review to the unusual situation in which the regulation being challenged was promulgated nineteen years ago under an exception to the APA that relieved the agency from its obligation to produce a contemporaneous statement explaining the regulation's basis and purpose. The court of appeals correctly held that under these circumstances a reviewing court may give some weight to explanations for the rule provided by agency counsel. The court also properly determined that the Secretary acted within the scope of the authority granted to him under the Agricultural Act of 1970 when he issued the husband-wife rule. The court of appeals' decision is consistent with the decisions of this Court and other courts of appeals. Further review of this case is, therefore, unwarranted.

1. Petitioner's many disagreements with the decision of the court of appeals amount to a single claim that the court improperly applied the arbitrary and capricious standard of review under Section 706 of the APA. Petitioner contends (Pet. 13-18) that the court departed from past precedent by considering agency counsel's explanations for the husband-wife rule instead of demanding that current or past employees of the agency explain the genesis of this regulation. Petitioner also claims (Pet. 8-13) that the court erred by examining the rationality of the husband-wife rule itself rather than scrutinizing the agency's decisionmaking process.

a. The court of appeals' decision to rely on agency counsel's explanation, however, was entirely appropriate in light of the unusual context of this case. Unlike most challenges to agency action, which ordinarily take place soon after a rule is promulgated, petitioner is contesting action that took place nearly twenty years ago. Moreover, because the rule concerned "a matter relating to * * * public * * * benefits," 5 U.S.C. 553(a)(2) (1982), it was promulgated under an exception to the APA's general requirement that a rule be accompanied by a concise statement explaining its purpose. Thus, the agency did not issue a contemporaneous explanation of the rule. Nor was there a record of agency proceedings. Thus, out of necessity, judicial review of the husband-wife rule must be based on some form of after-the-fact explanation. In these circumstances, as the court of appeals explained, it was not improper to give "at least some weight" (Pet. App. 8a) to counsel's explanation for the basis of the rule. At this remote point in time, as the court observed, "[i]t is possible, perhaps likely, that no one presently in the

agency has any better knowledge of the exact reasons that underlay the adoption of the rule than agency counsel." Pet. App. 11a. Consequently, a rigid exclusion of any explanation from counsel in this setting would merely substitute one form of "post-hoc rationalization" for another.

Contrary to petitioner's assertions, the court's decision to rely, in part, on representations by agency counsel does not conflict with this Court's holdings in *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), or *Camp* v. *Pitts*, 411 U.S. 138 (1973). In both of those cases the agency had compiled a contemporaneous administrative record that could be used for the purpose of judicial review. *Overton Park*, 401 U.S. at 419; *Camp*, 411 U.S. at 142. This Court held that when such a record exists, a reviewing court should not rely upon the post-hoc rationalizations for the agency's action presented in litigation affidavits. 401 U.S. at 419.[3] But in the present case, no such administrative record was created. Thus, the general principle that reviewing courts should rely upon contemporaneous rather than post-hoc explanations for an agency decision is inapplicable here.

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[3] Petitioner implies that the *Camp* Court objected to the use of post-hoc rationalizations by agency counsel. Pet. 14. It did no such thing. Rather, the Court reversed the court of appeals' ruling that the case be remanded to the district court for a trial de novo. 411 U.S. at 142. Such a proceeding, the court held, was inappropriate when the agency had compiled an "extensive administrative record" which had been "presented to the reviewing court." *Ibid.* *Camp*, however, does not address the question how a reviewing court should proceed when the agency has not compiled a contemporaneous administrative record.

The decision of the court of appeals is also consistent with *SEC* v. *Chenery Corp.*, *supra*. As the court of appeals noted, the primary reason why the *Chenery* Court required that agencies disclose the reasons for their actions to reviewing courts was to prevent those courts from "intrud[ing] upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U.S. at 88. But in the present case, where the agency exercised its rulemaking authority nineteen years ago, the court's reliance upon justifications for the husband-wife rule provided by agency counsel did not interefere with the agency's policymaking function. The agency policy was set long ago and has been applied consistently over the past two decades. Nothing a reviewing court does in this case will affect the way the agency interprets or applies the husband-wife rule in the future.

b. Petitioner further complains that the court of appeals did not scrutinize the decisionmaking process of the agency, as required under the arbitrary and capricious standard, but instead focused on whether the husband-wife rule was a legitimate interpretation of the Agricultural Act of 1970. Petitioner suggests that the court should have required the agency to produce witnesses and documents bearing on the 1970 decisionmaking process and should then have scrutinized the actual basis for the Secretary's action. Pet. 11 & n.7.

In the peculiar posture of this case, however, there is no reason to believe that the lower court's task of reviewing the husband-wife rule would have been a more meaningful or accurate inquiry if the current Secretary or other employees of the Department of Agriculture were made responsible for the primarily historical exercise of explaining why the husband-wife rule was promulgated in 1970. As the court of

appeals noted, in all likelihood such testimony would "add little" to the explanations for the husband-wife rule provided by counsel. Pet. App. 12a.[4]

Once the counsel's justifications for the rule are accepted as the best possible reconstruction of what occurred in 1970, it is clear that the court did scrutinize, and ultimately accept as reasonable, the Secretary's rule. As the court of appeals noted, the Secretary decided to prohibit married couples from receiving individualized (double) payments under the farm support programs because he believed that a husband and wife living together on a family farm comprised a single, interdependent economic unit. Pet. App. 14a-15a. The court concluded that in light of Congress's desire to cut back on excessive farm support payments it was entirely appropriate for the Secretary to consider the interdependence of married couples who own family farms. *Id.* at 18a. Thus, the court of appeals properly concluded that the husband-wife rule represented a reasonable decision by the Secretary that comported with the rationale of the Agriculture Act of 1970. Petitioner presents no reason why this Court should review this highly fact-bound inquiry.

2. Petitioner's contention that the court of appeals' decision conflicts with *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), is unfounded. As the Fifth Circuit quite clearly stated, the challenged regulation in that case was promulgated pursuant to Section 553 notice and comment rulemaking and, contary to the situation in the present case, the Secretary of Agriculture was required to set forth a

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[4] That the agency is represented by the U.S. Attorney's Office instead of the agency's general counsel is, of course, irrelevant.

statement of the regulation's purpose. 767 F.2d at 118.[5] Thus, *Garner* does not raise the question addressed by the court of appeals of whether counsel's explanation for a regulation may be considered when the agency is not obligated, under the APA, to issue a contemporaneous explanation for its action. In cases in which this question has arisen, other courts of appeals have refused to hold a regulation invalid simply because the agency did not compile a contemporaneous record. See, *e.g.*, *Bedford County General Hospital* v. *Heckler*, 757 F.2d 87, 90 (6th Cir. 1985); *Holy Cross Hospital-Mission Hills* v. *Heckler*, 749 F.2d 1340, 1346 (9th Cir. 1984). Thus, there is no conflict among the circuits that warrants this Court's review.

3. Finally, the issue that petitioner asks this Court to review is of no prospective significance. In 1987, Congress enacted legislation that expressly requires the Secretary to adopt a new version of the husband-wife rule, see Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303(a)(2), 101 Stat. 1330-16, and new regulations have been promulgated implementing that legislation, see 53 Fed. Reg. 29,552, 29,556 (1988) (codified at 7 C.F.R. 795.11). Moreover, questions about the proper use of counsel's explanation for regulations adopted without any contemporaneous statement of basis and purpose are unlikely to recur, because the Secretary has since 1971

[5] The regulation at issue in *Garner*, like the one challenged here, was exempt from the notice and comment requirements of the APA under 5 U.S.C. 553(a)(2) (1982). In 1971, however, the Department of Agriculture promulgated a regulation that made the procedural requirements of the APA applicable to all actions involving loans, such as the one in that case. 767 F.2d at 118 n.21.

subjected such regulations to the procedural requirements of Section 553 of the APA. See 53 Fed. Reg. 13,804 (1971). Consequently, there is little reason to believe that questions about the validity of the 1970 regulations, or about the unusual administrative law question generated by those regulations, will arise in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1989

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* The Solicitor General is disqualified in this case.

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